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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

KELLY GRAFF and KERI
GRAFF, his wife,

Plaintiffs-Appellants,

vs.

No. 18062

BOISE CASCADE CORPORATION,
A Delaware corporation,

Defendant-Respondent.

REPLY BRIEF OF APPELLANTS

Appeal from the Judgment of the
Fourth Judicial District Court, Utah County
Honorable David Sam, Judge

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ARGUMENT

THE LOWER COURT ERRED IN FAILING TO HOLD THE
MECHANICS LIEN OF DEFENDANT INVALID SINCE IT
FAILED TO COMPLY WITH UTAH LAW.

Defendant-Respondent has attempted to divert this
Court's attention from the true issue of this case i.e.,
whether the lien as filed by Defendant meets the require-
ments mandated by Utah law. Instead, Defendant has
focused its response upon a claim that Appellants are
attempting to argue that the "substantial compliance"
standard has been abandoned in Utah and that "technical
inconsistencies" will now invalidate all Utah liens.
(Defendant's Brief, p. 4).

Appellants have never argued before this Court that
the substantial compliance doctrine is no longer in effect

in Utah. Appellants agree that a supplier or laborer should not be deprived of his lien merely because of a minor mistake in the execution of the lien notice. The courts of this state as well as all states throughout the country liberally support a claimant when in fact the mistake is of minor importance and does not substantively affect the validity of the lien.

However, as noted by Defendant itself a mechanics lien is a creature of statute and "must therefore be in complete compliance with all statutory prerequisites to its validity." (Respondent's Brief, p. 4-5).

The question as to whether a "technical" deficiency or a substantive statutory deficiency has resulted must be determined on a case by case basis. Respondent cites, for example, the Lewis v. Midway Lumber, Inc. decision of the Arizona Court of Appeals and quotes language that substantial compliance is sufficient to validate a lien. However, while the court recognized the doctrine of substantial compliance it nevertheless invalidated the liens since the claimants had failed to correctly name the owner of the subject property or to serve the owner with proper notice. The court there held that such failure could not be said to have substantially complied with the statutory requirements of Arizona law.

As to this particular case, there can be no doubt that

Defendant failed to properly verify the lien as is required by Utah law. Defendant argues that because Mr. Buttars signed his name in the signature portion of the notice that this signature could be imputed to the verification portion and that in fact the notary was notarizing Buttars' signature.

As can be seen from an examination of the lien claim, however, such an argument stretches all interpretation of documents. The lien form prepared by Defendant itself provides that an agent of Boise Cascade Corporation must first sign the form as would any lien claimant. Second, however, the verification portion of the form allows for a second agent to verify the contents and truth of the lien. In this case, for example, an officer authorized to file liens could have signed the signature portion of the form whereas a local manager who actually sold the products may have been required to verify the truth of the contents contained in the form. Thus, two completely separate individuals could have signed the materialmen's notice and claim lien and may have actually been required to do so under the Boise Cascade Corporation structure.

In any event, the verification block does not state who is first being duly sworn upon oath but instead leaves a blank in this portion. Not only is the name omitted as to who is swearing but there is no signature on the bottom line indicating that the oath has actually been taken.

Defendant states that the Alaska Supreme Court case of Stevenson v. Ketchikan Spruce Mills, Inc. is "factually identical to the instant case." This statement is incorrect. In that case a signature block was signed by Lyle E. Anderson, manager of Ketchikan Spruce Mills, Inc. just as the signature was signed by Bert Buttars, Boise Cascade's agent. However, in the jurat of the notary it is stated "Lyle E. Anderson, being first duly sworn, upon oath, deposes and says." It then states that he is the "manager of Ketchikan Spruce Mills, Inc." and makes the verification on behalf of the corporation. The line below the jurat was left blank.

In Stevenson there could be no doubt that Lyle Anderson, the same person who had signed the signature portion of the lien, was the same person who had taken an oath before the notary public. This, plus the fact that Alaska specifically has a statute concerning substantial compliance distinguishes the Stevenson case from the instant appeal.

Likewise, Defendant cites the case of Anchorage Sand & Gravel Co., Inc. v. Wooldridge, 619 P.2d 1014 (Alaska, 1980) in support of its position that omission of the signature line following the jurat again is substantial performance with the lien requirement. In that case, however, the corporate officer signed his name in the correct location and the jurat specifically stated that Buff V. Jacobsen signed the oath. The

sole argument in Wooldridge was whether the language contained in the jurat was sufficient to constitute a verification and not whether the signature of the claimant was properly executed. In the instant case Appellants do not dispute that the language contained in the Boise Cascade form would have been a correct verification had the notary recognized that Buttars appeared before him and had Buttars actually signed the correct portion of the form.

The First Security Mortgage Co. case written by Justice Howe and the H.A.M.S. Co. case of Alaska are germane to this appeal only to the effect that verification and its language is a critical and absolute requirement of a valid lien and cannot be overlooked as can other errors made in the lien form. The H.A.M.S. Co. case specifically defined the word "verify" in accordance with common law usage as follows:

To confirm or substantiate by oath
Particularly used of making formal oath to
accounts, petitions, pleadings, and other papers.
. . . The word "verified" when used in a statute,
ordinarily imports a verity attested by the sanctity
of an oath. . . . To prove to be true; to establish
the truth of; to confirm; to confirm the truth or
truthfulness of; to check or test the accuracy or
exactness of; to confirm or establish the authenticity
of; to authenticate; to prove. 563 P.2d 260, quoting
Black's Law Dictionary, 1732-33 (4th Ed. 1951).

These decisions point out the fact that verification is not a "mere technicality" but is one of the essential elements of a valid lien claim. Just as an affidavit requires an oath

to become a valid affidavit a lien claim requires an oath to be verified if it is to have any legal effect. It is just as illogical to say that an affidavit with no name and which is unsigned is valid and proper for judicial use as to say that a lien claim which has no name and which is unsigned is valid under the lien statutes.

Whether the failure of Defendant to properly include the name of the individual to whom Defendant furnished materials on the lien form as required by statute is a "technicality" or is a material omission depends upon an examination of the entire form and the purpose for such requirement. The statute 38-1-7, U.C.A. requires both the name of the owner and the name of the person hiring the contractor or to whom the materials were furnished. Again, the owner and the person requesting the materials or work may not be the same and therefore both sources of information are statutorily required. It is difficult to understand how defendant can argue it substantially complied with the requirement of furnishing the information as to who employed it when there is no information whatsoever relating to this issue. The real question is whether the omission of that information invalidates the lien as a matter of law or whether it can be overlooked as a technical deficiency.

Appellants would argue that those items specifically

listed in the statute as being required cannot be so overlooked and that only items not specifically enumerated or items which are enumerated but not as to the specific form of enumeration should be given the benefit of the doubt and allowed to validate an erroneous lien form.

Finally, Defendant argues that equity demands that the lien be given effect in this case. The law is well settled, however, that equity has no place in determining mechanics liens. The Supreme Court of Kansas in Ekstrom United Supply Co. v. Ash Grove Lime and Portland Cement Co., 400 P.2d 707 (Kan. 1965) stated the following:

It is a settled rule in this state that equitable considerations do not give rise to a mechanic's lien. Being created by statute, a mechanic's lien only arises under the circumstances and in the manner prescribed by the statute. A lien claimant must secure a lien under the statute or not at all.

Likewise, the Supreme Court of Arizona in the Lewis, supra, made a similar comment when it stated:

Appellees argue that any failure to follow the statute in this case was not prejudicial. We do not agree. If a default or neglect is material to the perfection of a lien, it is beyond the remedial scope of equity, in the exercise of its usual powers, to protect the lien claimant against the untoward consequences of what may be and probably was his own neglect. The courts cannot read into either the statutes or the claim of lien what is not there, or take from either what is there. Id. at 756.

The reasons for this doctrine are simple. In many cases

two innocent parties are pitted against each other as in the instant case. The laborer or supplier is entitled to compensation for his work or materials. On the other hand, the homeowner is generally the opponent of the claimant. The homeowner has purchased the home and paid for it fully from the contractor. Both the lien claimant and the homeowner are victims of a defaulting contractor. Both are entitled to protection under the law. If the lien claimant properly complies with statutory lien laws which are in derogation to common law, then that claimant is given the advantage over the homeowner. If, on the other hand, the lien claimant fails to comply with these statutory mandates the homeowner must prevail. Neither the plaintiffs nor the defendant is free from fault in this case. The plaintiffs purchased the property even though a lien had been filed against it. Plaintiffs should have inquired as to the effect of such lien before consummating the purchase. They did not. Defendant, on the other hand, is a national corporation which has no doubt filed thousands of liens and yet incorrectly stated the name of the employer and failed to properly verify the lien claim. The defendant too, then, was negligent in its business affairs.

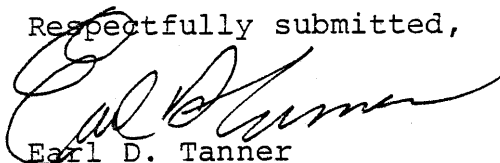
It is unfortunate that one of these two parties must suffer when the true culprit is the contractor which is not

even a party to this lawsuit and which is totally without assets. However, just as in many cases of statutory law, advantages or disadvantages are gained or lost upon compliance with rules, statutes, and regulations. In the instant case, had Defendant properly followed the statute it would have gained the advantage of a lien upon Plaintiffs' property even though Plaintiffs were not a party to the original transaction. Having failed to follow the statute, however, this advantage is lost and Defendant can only seek compensation under normal channels of contractual law.

CONCLUSION

For the preceding reasons, therefore, the lien upon Plaintiffs' home should be declared invalid and the judgment of the lower court reversed.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Reply Brief to Robert D. Maack, Vincent C. Rampton, Watkiss & Campbell, 12th Floor, 310 South Main Street, Salt Lake City, Utah 84101 this _____ day of December, 1982.
